

EPA Approves Oklahoma Regulatory Control Over ‘Restored’ Tribal Land

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In the wake of *McGirt v. Oklahoma*, the Environmental Protection Agency (EPA) is granting the State of Oklahoma certain environmental regulatory authority over Indian Country within the state. In a letter from EPA Administrator Wheeler, released by EPA on October 1, 2020 (EPA Letter), the EPA granted Governor Stitt’s request to administer federal environmental regulatory programs, including various portions of RCRA, CAA, CWA, SDWA, FIFRA, and TSCA. While the EPA Letter recognized “that, typically, in the absence of express authorization from Congress states do not have jurisdiction in Indian country to implement regulatory programs under the federal environmental laws administered by EPA,” that Section 10211(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005: A Legacy for Users, Pub. Law 109-59, 199 Stat. 1144, 1937 (August 10, 2005) (“SAFETEA”) required EPA’s approval of Oklahoma’s request. SAFETEA Section 10211 was a last-minute rider on the large transportation bill, sponsored by Senator Inhofe and passed over the objection of many Oklahoma Tribes. The legislation creates a special grant of authority for the state of Oklahoma over Indian Country within the state and specifically mandates that EPA grant any request by Oklahoma to administer federal environmental regulations in Indian Country “without any further demonstration of authority by the state.”

Governor Stitt’s requested EPA’s approval for state jurisdiction less than a month after the U.S. Supreme Court’s historic decision in *McGirt v. Oklahoma*, which upheld the Treaty boundaries of the Muscogee Creek Nation and recognized that Indian Country in Oklahoma included a large area that Oklahoma state officials had long considered (and regulated as) no longer Indian lands. The *McGirt* decision raises many jurisdictional questions surrounding the use and control of lands that were granted to five Oklahoma Tribes via Treaty, including the Muskogee (Creek) Nation, the Cherokee Nation, the Chickasaw Nation, Choctaw Nation, and Seminole Nation. These lands make up the Eastern half of the state of Oklahoma. EPA’s grant was hailed by some as a necessary step to clarify regulatory requirements within these areas, specifically by many energy companies with significant operations there. However, each of the Oklahoma Tribal Nations affected by the grant oppose the action.

What’s Next?

Potential litigation could challenge EPA’s grant of authority to the State of Oklahoma and delay the state assuming regulatory control. Legal challenges would likely center on claims regarding the sufficiency of EPA’s Tribal Consultation. Pursuant to Executive Order 13175, the EPA is obligated to engage in government-to-government consultation with affected Tribes prior to approval. Additionally, [EPA’s Policy on Consultation and Coordination with Indian Tribes](#) establishes various, requisite milestones for the Agency’s consultation process. Litigation to review whether and how EPA complied with its consultation obligations and milestones could delay the state’s assumption of environmental regulatory authority. Other legal claims could include whether EPA exceeded its authority under SAFETEA, and specifically the implications of *McGirt* on the geographic scope of EPA’s approval.

The upcoming election could also complicate EPA’s grant of authority to the state of Oklahoma. A Biden administration could seek to reverse course or delay implementation to allow for more robust consultation and engagement with Oklahoma Tribes.

Additionally, the EPA Letter may encourage Oklahoma Tribes to seek Treatment as a State under various federal environmental laws, which would reinstate Tribal environmental jurisdiction. Under the SAFETEA Act of 2005, Oklahoma tribes are still able to receive “Treatment as a State” (TAS) by the EPA to administer federal environmental programs, but provides that all TAS requests are subject to review and approval by the EPA Administrator and a cooperative agreement with the State of Oklahoma and its relevant agency.



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Van Ness Feldman continues to monitor this and other matters affecting Indian country. The professionals at Van Ness Feldman possess unique expertise in environmental regulatory programs, Native Affairs, and government affairs and can provide specialized and practical strategic counseling on the issues covered in this Alert. For further information, please contact [Maranda Compton](mailto:Maranda.Compton@vnf.com) at 202.298.1806 or mcompton@vnf.com, [Andrew Vanderjack](mailto:Andrew.Vanderjack@vnf.com) at 202.298.1941 or amv@vnf.com, or your contact within our Native Affairs, Environment, or Government Relations practices.

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